No. 89-7743

In The

Supreme Court of the United States

October Term, 1990

THADDEUS DONALD EDMONSON,

Petitioner,

v.

LEESVILLE CONCRETE COMPANY, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF OF DIXIE INSURANCE COMPANY IN SUPPORT OF RESPONDENT, LEESVILLE CONCRETE COMPANY, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

OTHERS AUTHORITIES

INTEREST OF DIXIE INSURANCE COMPANY, AMICUS CURIAE IN SUPPORT OF RESPONDENT, LEESVILLE CONCRETE COMPANY, INC.

Plaintiffs in an action against Dixie Insurance have petitioned for *certiorari* (No. 90-240) as a result of the Fifth Circuit's ruling in *Polk v. Dixie Ins. Co.*, 897 F.2d 1346 (5th Cir. 1990). The Fifth Circuit based its ruling on its earlier en banc opinion in *Edmonson v. Leesville Concrete Co.*, 895 F.2d 218 (5th Cir. 1990).

Because the decision by this Court in the *Edmonson* case will directly affect its interests, Dixie Insurance would like to state its position regarding this important and far-reaching issue.

Consent to file an amicus brief has been obtained from both Petitioner and Respondent in this matter as evidenced by letters of counsel filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

1. In the situation of private counsel of civil litigants exercising their right to peremptory strikes, the requisite state action for constitutional challenge does not exist. Further, the purely ministerial function of the court in excusing the potential juror is insufficient involvement by the state to render the process one of state action. "Mere approval of or acquiescence in the initiatives of a private party is not sufficient . . . . " *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Therefore, the test enunciated in *Batson v. Kentucky*, 476 U.S. 79 (1986), in the context of

equal protection, should not be extended to control the actions of private parties.

2. The innate differences between a criminal and civil proceeding make it unnecessary to extend the rule set forth in *Batson v. Kentucky* for criminal defendants to civil litigants. The criminal justice system has long required higher levels of protection and more safeguards for criminal defendants than that afforded to civil litigants. Thus, in balancing the recognized importance of peremptory strikes with the interests of civil litigants, as opposed to criminal defendants, the safeguards deemed necessary in *Batson* should not be required in civil trials.

3. The actions complained of by Petitioner in this case are not the type requiring the application of the Court's supervisory powers. In fact, exercise of the Court's supervisory powers would adulterate the long recognized importance of the civil litigant's unfettered use of peremptory strikes in an effort to obtain an unbiased jury in his cause of action.

ARGUMENT

Once again this Court is called upon to make a decision regarding peremptory strikes and their alleged use as a discriminatory tool. Quite simply, the question before the Court is whether or not the procedure enunciated in *Batson v. Kentucky*, 476 U.S. 79 (1986), should now be made applicable in civil proceedings as well. Because there is no state action involved when a private party makes use of his peremptory strikes and because of the

inherent differences between criminal and civil proceedings, the *Batson* rule should be limited to criminal trials.

I. When a private party makes use of his peremptory strikes in a civil action, the requisite state action for constitutional challenge does not exist.

It hardly needs reiterating that "the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).[1] Furthermore, "private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some *significant* extent the State in any of its manifestations has been found to have become involved in it." *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) (emphasis added).

Obviously, the act of an attorney in exercising peremptory strikes for a private party in a civil suit is private conduct and outside the reach of equal protection challenges. Indeed, in *Polk County v. Dodson*, 454 U.S. 312 (1981), this Court held that a public defender, paid by the

[1] Because the action complained of in the present suit occurred in federal court, it is actually the Fifth Amendment's due process guarantee at issue rather than the Fourteenth Amendment's equal protection clause. Of course, the Fifth Amendment's due process clause has been held to guarantee the same rights as the Fourteenth Amendment's equal protection clause. *Bolling v. Sharpe*, 347 U.S. 497 (1954). Consequently, cases interpreting state action under the Fourteenth Amendment are applicable in the discussion of this case as well.

state, is not a state actor "when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." *Polk County*, 454 U.S. at 325. Consequently, Edmonson does not claim that the lawyer's actions alone are enough; rather, it is his contention that the trial judge, by not interfering with Respondent's use of its peremptory strikes, supplies the requisite state action. In essence, Edmonson argues that the Court's *inaction* constitutes state action in this case. However, such a claim clearly fails to establish that the state is involved to a "significant extent." *Burton*, 365 U.S. at 722.

Similar reasoning was disallowed in the case of *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). The Court stated as follows:

> Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into "state action." . . . Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so "state action" for purposes of the Fourteenth Amendment.

Jackson, 419 U.S. at 357 (footnote omitted). Furthermore, "[t]his Court . . . has never held that a State's mere acquiescence in a private action converts that action into that of the State." *Flagg Bros. v. Brooks*, 436 U.S. 149, 164 (1978).[2]

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[2] *See also Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) ("Mere approval of or acquiescence in the initiatives of a private party is not sufficient . . . . ")

It is the attorney, a private citizen, who makes the decision regarding which potential jurors to exclude by means of peremptory strikes in a civil action; the judge merely acquiesces in this decision and excuses the jurors so named. The judge in no way fosters or encourages the use of peremptory strikes in a racially discriminatory manner.[3] The same statement can be made regarding the attorney's decision as was made of the creditor's in *Flagg Bros.*, 436 U.S. at 165: "[T]he State of New York is in no way responsible for Flagg Brothers' decision, a decision which the State in § 7-210 permits but does not compel . . . . "

Because the State cannot in any manner be deemed to have participated to a significant extent in a private party's exercise of peremptory strikes, the procedure set forth in *Batson v. Kentucky*, 476 U.S. 79 (1986), which was based on equal protection principles, should not be made applicable to private parties in civil litigation.

II. The innate differences between a criminal and civil proceeding make it unnecessary to apply the *Batson* rule to civil litigants.

Even without the problem of the lack of state action, the *Batson* rule should still not be applied to civil litigants since the interests of civil litigants need not be protected

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[3] *See, e.g., Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176-77 (1972) ("However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise.")

to the same level as that of criminal defendants. Due to the high stakes involved in criminal trials (many times even the very life of the defendant is at stake), the judicial system has long provided greater procedural safeguards to criminal defendants than those afforded to civil litigants. Just one example is the higher burden of proof required in criminal trials as opposed to civil actions.

Although restricting to some degree the prosecutor's use of peremptory challenges may thus be justified, the same cannot be said for civil litigants. While the interests of the criminal defendant possibly outweigh the interests of the prosecutor in having unfettered use of his peremptory strikes, the interests of civil litigants do not reach this level. Thus, the unfettered use of peremptory strikes should be maintained in civil proceedings.

The importance of peremptory strikes has long been recognized.[4] As stated in *Swain v. Alabama*, 380 U.S. 202, 219 (1965), "The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise." One author described its function as follows: "The peremptory challenge is the right to exclude from the panel those who are suspected of entertaining a prejudice against a party where sufficient reasons cannot be given for their exclusion for cause." Note, Ross v. Oklahoma: *A Strike Against Peremptory Challenges*, 1990 Wis. L. Rev. 219, 222. In fact, this

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[4] The importance of peremptory strikes was recognized by this Court as early as 1892 in the case of *Lewis v. United States*, 146 U.S. 370 (1892). *See also Pointer v. United States*, 151 U.S. 396 (1894).

author went so far as to assert that "peremptory challenges should receive constitutional protection." *Id.* at 232. Although the Court has not agreed with this rationale, *see Stilson v. United States*, 250 U.S. 583, 586 (1919), only last Term the Court did state that "[o]ne could plausibly argue . . . that the requirement of an 'impartial jury' impliedly *compels* peremptory challenges . . . . " *Holland v. Illinois*, 110 S.Ct. 803, 808 (1990). Thus, the significance of peremptory challenges was acknowledged once again.

In balancing the importance of peremptory strikes with the interests of civil litigants which are affected by their use, the result does not compel the restriction of peremptory challenges as required for criminal defendants in *Batson*. In fact, the nature of civil proceedings probably makes the unrestricted use of peremptory strikes even more important than in criminal prosecutions. As noted by the Fifth Circuit in this case:

> [T]he prosecutor's aim is justice. He wins when justice is done and – although it is surely not the outcome he envisions – when it becomes apparent during the trial of a criminal case, a la the celebrated fictional character of Perry Mason, that the accused is innocent of the crime with which he stands charged, the prosecutor has not "lost."
>
> It is otherwise with the civil advocate. His client is in a quarrel, and he is in a fight. The fight may be a more or less genteel one, conducted in an ethical fashion to be sure; but it remains a fight nonetheless: one which, unless settled, will be won by one side of the contest and lost by the other. It is the first imperative of the civil advocate to see that it is his side that wins.

Edmonson v. Leesville Concrete Co., 895 F.2d 218, 225-26 (5th Cir. 1990). With this goal in mind, the attorney for a civil litigant should have the right to strike anyone from the panel whom, for whatever inexplicable reason, he feels may not favor his client. Of course, the party's opponent has the same opportunity. Thus, between the two litigants' use of their limited number of strikes, an equitable balance is achieved.

Considering the interests affected by the use of peremptory challenges against a party in a civil action, as opposed to the high stakes involved in criminal trials, and the recognized importance of such peremptory strikes in civil litigation, the restrictions applied to peremptory strikes in *Batson* are not justified in the civil arena.

III. The actions complained of by Petitioner in this case are not the type requiring application of the Court's supervisory powers.

Obviously feeling that his constitutional arguments are not strong enough, Edmonson "throws himself on the mercy of the Court" and requests that the Circuit Court's opinion be reversed by use of this Court's supervisory powers over federal courts. A look at the cases Edmonson relies on will show that the actions complained of in this case are not of the same character as those corrected by the Court's supervisory powers in the past.

In *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946), the Court exercised its supervisory powers to reverse a judgment in a case where the clerk of the court and the jury commissioner "deliberately and intentionally excluded

from the jury lists all persons who worked for a daily wage." *Thiel*, 328 U.S. at 221. Thus, the State itself was systematically excluding an entire economic class from jury service. The Court found that "[t]he undisputed evidence in this case demonstrate[d] a *failure to abide by the proper rules* and principles of jury selection." *Thiel*, 328 U.S. at 221 (emphasis added). Such is not the case in the underlying action. Proper rules were followed at all times – Leesville Concrete was allowed to peremptorily strike three potential jurors, it did so, and the jurors were excused. This is not a case where the Court's supervisory powers are needed to correct a wrong, for no wrong has been committed. This is equally true in relation to the case of *Ballard v. United States*, 329 U.S. 187 (1946).

Were the Court to step in and utilize its supervisory powers, it would severely limit the civil litigant's unfettered use of peremptory strikes in an effort to obtain a jury unbiased toward his cause. Considering the lack of state action, the importance of peremptory strikes, and the lesser stakes involved in a civil trial as opposed to a criminal prosecution, such action would be unjustified.

CONCLUSION

In light of the foregoing discussion, the *Batson* rule should not be extended to the exercise of peremptory challenges by private parties in a civil action. Therefore, the decision of the en banc Fifth Circuit, *Edmonson v. Leesville Concrete Co.*, 895 F.2d 218 (5th Cir. 1990), should

be affirmed, and *certiorari* should be denied in *Polk v. Dixie Ins. Co.*, No. 90-240.

Respectfully submitted,

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